

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FEDERAL DEPOSIT INSURANCE COMPANY, :
as Conservator for IndyMac Federal Bank, FSB, :
Plaintiff, :
-against- :
STEWART TITLE INSURANCE COMPANY, :
Defendant. :
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**ORDER DENYING MOTION
AND CROSS-MOTION FOR
FOR SUMMARY JUDGMENT**

08 Civ. 873 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Residential Home Funding Corp. (“Residential”), a mortgage lender, took a first mortgage of \$480,000 and a second mortgage of \$90,000 from Ricardo Mohammed on April 5, 2007, to enable him to purchase a house in Brooklyn, New York. Residential secured policies of title insurance from Stewart Title Insurance Company (“Stewart Title”), the defendant in this lawsuit, and then sold the two mortgages and the title insurance to IndyMac Federal Bank, FSB (“IndyMac”). IndyMac sold the first mortgage of \$480,000 to Federal Home Loan Corporation (“Freddie Mac”) on May 20, 2007. IndyMac retained Mohammed’s note and his second mortgage, as well as the right to service both mortgages. When Mohammed defaulted in making his first payment, Freddie Mac demanded that IndyMac take back its mortgage.

After Mohammed’s default, but before it became insolvent, IndyMac discovered that the underlying transaction and the mortgage given by Mohammed were fraudulent. On September 28, 2007, IndyMac made demand on Residential to take back the mortgages and note purchased by IndyMac. Residential did not respond, despite IndyMac’s many efforts to elicit a response. On November 28, 2007, IndyMac made demand on Stewart Title for payment on the

mortgages, claiming that title to the underlying property was defective and offering to assign the mortgages and promissory note given by Mohammed. Stewart Title did not respond.

IndyMac took back the Mohammed mortgage from Freddie Mac, and brought this lawsuit on the title against Stewart Title on January 24, 2008. When IndyMac became insolvent, Federal Deposit Insurance Corporation (“FDIC”) became its receiver, succeeding to its rights and interests, and was substituted for IndyMac in this action on December 12, 2008.

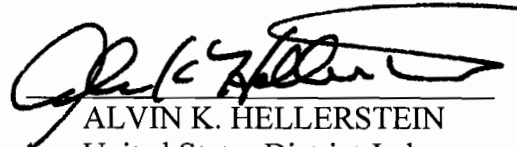
Both plaintiff and defendant move for summary judgment, apparently without having conducted meaningful discovery. Defendant argues that Freddie Mac, and not IndyMac, is the insured on the \$480,000 policy. Plaintiff argues that IndyMac is entitled to coverage under the policy, and that Defendant refused its claim in bad faith.

Both the motion and the cross-motion are denied. Among other deficiencies, there has been no competent proof (a) that any of the conditions that could trigger coverage under the Stewart Title policy in fact occurred; (b) that plaintiff has in its possession the note and the mortgages that must be delivered to Stewart Title in exchange for payment; or (c) that either the policy, or Stewart Title, excused such delivery. In past proceedings, plaintiff conceded that it did not have the note in its possession, and has not contradicted those representations. Because an insured party has an obligation, constructive or actual, to deliver effective security to its insurer to aid in prosecution of its claims, it is not clear whether plaintiff has standing to assert a claim under the insurance. Moreover, plaintiff has offered no proof of the nature of the fraud that caused it to assert a claim. The affirmation of Richard Metli, an attorney for Stewart Title, recites arguments, not facts, and is entirely worthless. Neither party has presented a clear showing of any state of relevant and material facts.

All discovery in this case must be completed by June 5, 2009. I will meet with the parties, at conference, on June 19, 2009, at 9:30 a.m., to set a trial date and a final pre-trial conference date. These dates will not be adjourned. The Clerk shall mark the motions (Docs. #22 & #28) as terminated.

SO ORDERED.

Dated: March 10, 2009
New York, New York



ALVIN K. HELLERSTEIN
United States District Judge